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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JEFFREY ROSENFELD,

Petitioner,

vs.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As its *sole* basis for opposing the Petition for Writ of Certiorari, River Place East Housing Corporation (hereinafter referred to as "River Place") brought to the Court's attention that new legislation regarding the dischargeability of post-petition cooperative assessments is pending in Congress. Without quoting the actual text

of the proposed amendments, River Place incorrectly summarized the proposed legislation on page 6 of their Brief in Opposition:

> "The Fairness to Condominium and Cooperative Owners Amendment of 1993 (hereinafter, the "Amendment") facing immiment passage by Congress, specifically clarifies that maintenance assessments levied after the filing of a debtor's bankruptcy petition are *not* dischargeable as a pre-petition claim."

River Place mischaracterizes the proposed amendments to 11 U.S.C. §523 passed by the Senate[1] and pending in the House of Representatives[2] (hereinafter collectively referred to as "proposed amendments"). The proposed amendments are *very* limited in scope. The House of Representative's version applies only to owners of condominiums and cooperatives who continue to *occupy* the dwelling unit; while the Senate version only applies to owners of condominiums and cooperatives who continue to *occupy* the dwelling unit *or receive rental* payments from a tenant of the dwelling unit. (2a, 4a). Congress is attempting to correct the anomaly of a debtor who lives in or receives rental income from his condominium or cooperative dwelling unit while enjoying immunity from *in personam* liability for accruing assessments.

The limited scope of the proposed Congressional amendments do not change, and in fact *magnify*, the need of this Court to resolve the issues raised in Rosenfeld's Petition. The proposed amendments do not

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[1] House Resolution 1583, titled the Fairness to Condominium and Cooperative Owners Amendment of 1993. (1a).

[2] Section 311 of Senate Bill 540 known as the Thurmond/Helms Amendment No. 1635. (3a).

address the voluminous cases where the debtor's use of the dwelling unit does not fall within the specific uses enumerated in the proposed amendments[3]. Furthermore, the proposed amendments are still only proposals, which have not and may not be enacted. They should not be used as a basis for the denial of the Petition.

ARGUMENT

I.

THE PROPOSED AMENDMENTS SHOULD NOT BE A BASIS FOR DENYING THE WRIT OF CERTIORARI BECAUSE THE PROPOSED AMENDMENTS HAVE NOT BEEN, AND MAY NEVER BE, ENACTED INTO LAW.

River Place suggests that the existence of pending legislation is a valid basis for denying a Petition for a Writ of Certiorari. Although this Court has denied Petitions on the basis of an actual change in legislation that makes the issue moot[4], Rosenfeld has found no reported cases where a Petition has been denied because of the existence of proposed legislation. In addition to the substantive arguments stated below that assume the proposed amendments will be enacted, Rosenfeld submits that the pro-

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[3] In the instant case, Rosenfeld abandoned dominion and control of his unit, and therefore would not fall within the scope of the proposed amendments. The Bankruptcy Court found that "the debtor is not in possession of the unit and has not occupied or possessed the unit at any time relevant to this case." (Pet. App. 6a). The Fourth Circuit reiterated this fact, stating first that "Rosenfeld acquired the River Place apartment as an investment and has never resided there," and second, that "Rosenfeld has asserted no ownership interest in the unit and has not leased the apartment to anyone since his bankruptcy petition." (Pet. App. 41a, Pet. App. 42a).

[4] *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1954).

posed amendments should not affect the merits of Rosenfeld's Petition for a Writ of Certiorari since the legislation may never be enacted or may be enacted in a substantially altered form.

II.
THE PROPOSED AMENDMENTS WILL NOT RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE SEVENTH CIRCUIT FOR DEBTORS WHO DO NOT FALL WITHIN THE LIMITED SCOPE OF THE AMENDMENT.

The passage of the proposed amendments will not resolve the conflict between the Fourth Circuit and the Seventh Circuit as to whether the post-petition assessments are discharged. Resolution of this fundamental issue is still necessary since the proposed amendments do not address whether post-petition assessments are a "claim" which is discharged for all debtors who do not fall within the scope of the proposed amendments. *See* 11 U.S.C. §727(b). If this fundamental issue is not addressed, the dischargeability of such assessments which are not included in the proposed amendments will still be dependent upon which jurisdiction the debtor is entitled to declare bankruptcy.

The number of cases that arise outside the scope of the proposed amendments are substantial, and not *de minimis* (as implied by River Place). The issue of the dischargeability of accruing post-petition assessments will arise again and again in situations not covered by the proposed amendments. The following scenarios would not fall under the proposed amendments:

(a) debtors such as Rosenfeld[5] who abandon investment property because the rental income

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[5]See footnote 3, *infra.*

does not equal or exceed the mortgage payments, cooperative assessments and other costs of ownership;

(b) debtors who cannot afford the costs of their primary residence and therefore move to more affordable accommodations;

(c) debtors who own single family residences that are neither condominiums or cooperatives but which are subject to homeowner's association assessments;

(d) debtors who abandon business property, which is subject to assessments, when they can no longer afford to continue operations;

(e) debtors who fall within the scope of the proposed legislation, but who filed bankruptcy before the effective date of the proposed amendments; and

(f) all debtors who own units subject to association assessments in the event the proposed amendments are not enacted by Congress.

Under the holding in *In re Rosteck*, 899 F.2d 694 (7th Cir. 1990), the accruing assessments are discharged in each of the above scenarios. Under the Fourth Circuit's decision in this case, the accruing assessments are not discharged.

A decision by this Court is necessary to resolve the conflict between the Circuits as to whether assessments not addressed by the proposed amendments are discharged. By contrast, a denial of the Petition for Writ of Certiorari at this time will only result in the issue again being presented to this Court in one of the above fact patterns in the event of the passage of the proposed amendments. Judicial economy will be served by the granting of the Petition for a Writ of Certiorari and resolution of the issue at this time.

III.
CONCLUSION

River Place's argument that "taking action at this time is unwarranted, given the imminent actions of the legislature" is without merit. The proposed amendments may not be enacted, and even if enacted, will not solve the problem of the dischargeability of assessments except as to the limited scope of the proposed amendments. Only a decision affirming *In re Rosteck* and overturning the Fourth Circuit will manifest Congress' intent to provide all debtors who are not covered by the proposed amendments (as is the case with Rosenfeld) with a fresh start.

Respectfully submitted,

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APPENDIX A

103D CONGRESS
1ST SESSION

H.R. 1583

To amend title 11 of the United States Code to make nondischargeable debts for postpetition fees payable to a membership association with respect to the debtor's interest in, and for the period during which the debtor occupied, a dwelling unit that has condominium or cooperative ownership.

IN THE HOUSE OF REPRESENTATIVES

April 1, 1993

Mr. HYDE introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 11 of the United States Code to make nondischargeable debts for postpetition fees payable to a membership association with respect to the debtor's interest in, and for the period during which the debtor occupied, a dwelling unit that has condominium or cooperative ownership.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness to Condominium and Cooperative Owners Amendment of 1993".

SEC. 2. AMENDMENTS.

Section 523(a) of title 11, United States Code, is amended–

(1) in paragraph (11) by striking "or" at the end,

(2) in paragraph (12) by inserting "or" at the end, and

(3) by adding at the end the following:

"(13) for a fee that becomes payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium or cooperative ownership, if such fee is payable for a period during which the debtor occupied such dwelling.".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.–Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS. – The amendments made by section 2 shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.

APPENDIX B

AMENDMENT NO. 1635

(Purpose: To amend title 11, United States Code, to clarify that post-bankruptcy fees payable to a membership association with respect to the debtor's interest in a dwelling unit that has condominium or cooperative ownership are nondischargeable debts for the period during which the debtor occupied the unit or received rental payments for it)

Mr. THURMOND. Mr. President, I send an amendment to the desk for myself and Senator HELMS and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from South Carolina (Mr. THURMOND), for himself and MR. HELMS, proposes an amendment numbered 1635.

Mr. THURMOND, Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 235, between lines 13 and 14 insert the following:

SEC. 311. FAIRNESS TO CONDOMINIUM AND CO-OPERATIVE OWNERS.

Section 523(a) of title 11, United States Code, as amended by section 210, is amended—

(1) by striking "or" at the end of paragraph (13);

(2) by adding "or" at the end of paragraph (14); and

(3) by adding at the end of the following new paragraph:

"(15) for a fee that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, if such fee is payable for a period during a substantial portion of which—

"(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

"(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee for a period arising before entry of the order for relief in a pending or subsequent bankruptcy proceeding."

Mr. THURMOND. Mr. President, I rise today to offer an amendment to S. 540 to clarify an ambiguity in the Bankruptcy Code which has led to confusion, conflicting judicial decisions, and unfair outcomes in many cases. This amendment relates to bankrupt debtors who own condominium or cooperative units in a community association. It is necessary to correct a line of cases in which courts have held that future payments by the debtor to a community association are discharged in bankruptcy. This amendment simply makes clear that assessments by community associations which become due after the bankruptcy order for relief are not discharged, as long as the debtor receives the benefits.

Mr. President, today there are some 5 million condominium units in our Nation, in addition to cooperative units and other forms of community associations.

Together, these community associations represent a significant percentage of this country's housing. These associations are found throughout the country, with the highest concentration in Hawaii, where condominiums alone make up over 20 percent of the available housing. In addition, Florida, Connecticut, California, and Colorado have significant percentages of community associations, along with many other States.

The owners of units in community associations typically pay monthly fees to cover a broad range of services provided by the association. These fees generally pay for maintenance and repair of the condominium building and common areas. This ensures that the structure itself and all common areas, including elevators, heating and cooling systems, and similar elements, remain in satisfactory condition. In addition, the fees often pay for insurance, for maintenance of driveways and parking areas, for landscaping and for snow and trash removal. Significantly, in many cases the associations' assessment also covers the utilities used by individual units so that separate metering and billing is not necessary.

With the current ambiguity in the Bankruptcy Code, owners of units in community associations may be unfairly burdened by increases in their association fees if their neighbors declare bankruptcy and receive a discharge of the association fees which are due in the future. Some courts hold that these future fees are discharged in bankruptcy, so that the debtors need not pay their share of the expenses of the association even in the future after their bankruptcy is over and even though they continue to receive benefits from the association.

Courts which reach this conclusion have sometimes recognized that the result makes no sense, but feel that it is compelled by the Bankruptcy Code, which can only

be changed by the Congress. The Seventh Circuit Court of Appeals held in the matter of Rostek that future association fees were discharged so that the debtor was free from payments to the condominium association. The seventh circuit stated that the result was "troubling," but believed it was compelled by the language the Congress used in the Bankruptcy Code. That appellate court went on to explain correctly that it did not have the "power to change" that language to reach a more "palatable" result. However, in the Congress we do have that power and should exercise it to remedy this problem.

Some judicial decisions suggest that this problem is limited, for in many cases the condominium unit will be sold and the debtor will receive a free ride only for the time that it takes to dispose of the unit. However, in many cases there is no equity in the unit, so the trustee and the mortgage holder will allow the debtor to retain the unit indefinitely. While the association may have the right in theory to foreclose, in practice the mortgage holder will receive all of the recovery, so that the association will not even cover the attorneys' fees for its trouble. It is in these cases that the present system is most unfair and the need for my amendment is greatest.

This amendment would further the goal of the bankruptcy laws, which is to give debtors a fresh start by discharging their past debts while holding them responsible for any new obligations or benefits they obtain. My amendment allows all past debts owed to the community association to be discharged and simply requires payment of the assessments which become due after the bankruptcy order for relief, and only if the debtor actually receives the benefits by occupying the unit or receiving rental income from it. To further ensure that the purposes of the bankruptcy law are achieved, express lang-

uage has been added to the amendment to clarify that debts to the association are not discharged if the debtor later files a subsequent bankruptcy proceeding.

Mr. President, my amendment would make the Bankruptcy Code fairer and more equitable. The debtor's neighbors who belong to the community association will be treated much more fairly by avoiding the higher assessments which result from giving the debtor a free ride. The debtor will be treated fairly because the amendment does not affect the dischargeability of fees due prior to the final order of relief in the bankruptcy. Also, as I stated earlier, the amendment applies only to situations where the debtor benefits from the dwelling unit by occupying it or receiving rents from it, and in those instances the debtor should be required to pay the postbankruptcy assessments to the association.

For all of these reasons, I urge my colleagues to support this amendment.

Mr. President, both managers of the bill have agreed to the amendment. I urge adoption of the amendment, if it meets their approval.

The PRESIDING OFFICER. The Chair recognizes the Senator from Alabama.

Mr. HEFLIN. Mr. President, before we urge adoption, let me make a statement on this. I think this is an excellent amendment.

This amendment is designed to make clear that it is not the intention of Congress that a debtor be absolved of his obligations to continued payment of his share of common expenses due to his condominium or cooperative association which come due after he has filed bankruptcy.

It seems that some courts have interpreted section 523 of the code not only to discharge the debtor from liability for common area maintenance assessments which have come due prior to his filing bankruptcy, but for those debts coming due after the date of filing. This has severely impacted thousands of association members across the country by increasing their fees to carry the burden of those members whose obligations have been discharged in bankruptcy proceedings.

The current state of the law on this issue is quite confused. Some courts treat the obligation to pay future assessments based on a prepetition obligation as discharged in its entirety upon filing of a petition. Other courts hold that the postpetition assessments are not discharged because they have not become due at the time of filing. Still other courts reason that the postpetition obligations cannot be discharged because they constitute a covenant which runs with the land, which can be terminated only by terminating ownership interest.

This amendment will clarify the ambiguity that now occurs within the courts regarding association fees for condominium and cooperatives. It will make nondischargeable the membership association fees that become payable after the order for relief if such fee is payable for the period in which the debtor occupies the dwelling after the order for relief.

I am aware that presently seven States, and the District of Columbia have passed lien statutes which are directed at this problem.

For these reasons, I support this amendment.

I congratulate the distinguished Senator from South Carolina for bringing this to our attention because this is an example of why bankruptcy reform is an ongoing

situation, why we need a National Bankruptcy Review Commission, and why we ought to be able to address these issues as they arise, rather than having a great number of condominium association and cooperative memberships suffer as a result of it.

So I thank the Senator for bringing it to our attention.

Mr. THURMOND. I wish to thank the majority manager and the minority manager, too, on this bill.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, we accept the amendment on this side of the aisle. This falls into the category of which I spoke in my opening remarks on this particular bill and on the work of the National Bankruptcy Commission, that this is an example of fine tuning that from time to time a code must go under to recognize the economic realities of how we do business in this country and the changes from day to day.

The PRESIDING OFFICER. (Mr. LIEBERMAN). Is there further debate? If not, the question is on agreeing to the amendment.

The amendment (No. 1635) was agreed to.

Mr. HEFLIN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. THURMOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. I thank the Senator.

Mr. REID addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Nevada [Mr. REID].

Mr. REID. Mr. President, I received a fax yesterday in the form of a letter from an attorney in Reno, NV, by the name of Jeffrey Giles. I think, Mr. President, this sums up why we are here today.

DEAR SENATOR REID. I received a fax from the National Association of Bankruptcy Attorneys asking that I along with others communicate with you regarding the reform bill. I am not opposed to a prohibition on repeat filings. It would probably be a good thing.

I think here is the paragraph of importance.

However, the legislation in some form should be passed immediately. This reform measure has been in the works for nearly 2 years and the essence of it needs immediate enactment.

Good luck. I remain, sincerely yours, Jeffrey Giles.

The reason I mention this to the President and through you to the manager of the bill, the senior Senator from Alabama, is to congratulate him on his great work on this legislation.

I have spent time with the Senator's staff. They are well versed in the law. They are very easy to work with, and as a result of the work that I have been able to do with Senator HEFLIN and his staff, I think the bill is better than it would have been. Perhaps some of the matters that I suggested be placed in the bill would have eventually gotten in there anyway.

This bill that is now before the Senate is a good bill. I have a couple of amendments that I am going to offer. Mr. President, one of which is entirely relevant; one is not entirely relevant. But the mere fact that I am offering these amendments does not take away from the work

of the manager of this bill. I think the majority and minority on this matter have done very good work for the American people.